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No. 05-493

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IN THE SUPREME COURT OF THE UNITED STATES

ROBERT AYERS, Acting Warden,
Petitioner,

v.

FERNANDO BELMONTES,
Respondent.

On Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

BRIEF OF TEXAS AND SIXTEEN OTHER STATES AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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This is a capital case.

QUESTIONS PRESENTED

1. Does *Boyde v. California,* 494 U.S. 370 (1990), confirm the constitutional sufficiency of California's "unadorned factor (k)" instruction where a defendant presents mitigating evidence of his background and character which relates to, or has a bearing on, his future prospects as a life prisoner?

2. Does the Ninth Circuit's holding, that California's "unadorned factor (k)" instruction is constitutionally inadequate to inform jurors they may consider "forward-looking" mitigation evidence, constitute a "new rule" under *Teague v. Lane,* 489 U.S. 288 (1989)?

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INTEREST OF *AMICI CURIAE*

Amici States have a substantial interest in ensuring the validity of death sentences obtained through constitutional means. States also have an interest in defending clearly drafted sentencing statutes — such as the instant California catchall mitigation instruction — from *ad hoc* and unwarranted collateral attacks in federal court. If the lower court's decision is allowed to stand, the policy of finality embodied in *Boyde v. California,* 494 U.S. 370 (1990), will be a nullity. This policy crucially protects state court judgments based on constitutional sentencing proceedings where an appellate court — sometimes decades later — recharacterizes the mitigating evidence in a way no reasonable jury would in order to obtain relief for a death-sentenced inmate. *Amici* States are prejudiced by such actions which are often based on nothing more than supposition and speculation. Thus, the Attorney General of Texas, and the attorneys general of *amici* States, have a significant stake in this Court's resolution of the Questions Presented.

SUMMARY OF THE ARGUMENT

Respondent Fernando Belmontes was convicted of the brutal murder of Stacy McConnell in Victor, California in 1981. During the sentencing phase of Belmontes's capital trial, the defense presented evidence of his troubled childhood, wholesome character, and good behavior during a prior commitment to the California Youth Authority in mitigation of punishment. This evidence was offered to show that Belmontes was not incorrigible and could make a positive contribution to prison society if incarcerated for life.

The jury was then presented with a catchall mitigation instruction submitted as part of a longer, non-exhaustive list of mitigating factors to be considered.[1] Ultimately, however, the jury

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1 Notably, the trial court instructed the jury that its consideration of aggravating evidence *was* limited to the enumerated factors in the instructions.

sentenced Belmontes to death and the California Supreme Court affirmed. *People v. Belmontes,* 755 P.2d 310 (Cal. 1988), *cert. denied,* 488 U.S. 1034 (1989).

Belmontes's state and federal district court collateral attacks were unsuccessful, but the United States Court of Appeals for Ninth Circuit eventually held — for reasons Belmontes himself *never* advanced — that his death sentence was unconstitutional because the catchall mitigation instruction prevented the jury from duly considering his mitigating evidence. *Belmontes v. Brown,* 414 F.3d 1094 (9th Cir. 2005). This Court granted certiorari review and should now reverse.

The Ninth Circuit's decision relies upon a spurious distinction between forward- and backward-looking mitigating evidence that finds no support in this Court's decisions. Initially, this Court has implicitly rejected the lower court's reasoning in both *Franklin v. Lynaugh,* 487 U.S. 164 (1988) (plurality opinion), and *Johnson v. Texas,* 509 U.S. 350 (1993), where it held that there was no practical difference between forward- and backward-looking sentencing considerations. Further, state courts have taken a similar approach, largely relying on this Court's reasoning in *Tuilaepa v. California,* 512 U.S. 967, 977 (1994), and *Skipper v. South Carolina,* 476 U.S. 1 (1986). The court below clearly erred when it held that such a distinction creates a reasonable likelihood of Eighth Amendment error.

Regardless, the lower court's opinion is in direct conflict with this Court's holdings in *Boyde* and *Brown v. Payton,* 544 U.S. 133 (2005), which approved of the California catchall mitigation instruction. In fact, this Court has long noted that such catchall instructions are sufficient to protect a capital defendant's interest in individualized sentencing. *See, e.g., Penry v Johnson,* 532 U.S. 782, 803 (2001); *Blystone v. Pennsylvania,* 494 U.S. 299, 305 (1990). Consequently, the Attorney General of Texas, and the attorneys general of *amici* States, respectfully suggest that this Court should reverse and hold that catchall instructions on mitigating evidence are constitutionally adequate for Eighth

Amendment purposes.

ARGUMENT

At the root of this Court's capital jurisprudence are found the competing — and arguably irreconcilable — interests involved in capital sentencing: the requirement for an individualized determination of moral culpability based on both aggravating and mitigating factors, and the need to guide and channel a jury's consideration of these factors adequately so as not to render the result arbitrary and capricious. The *Woodson* line of cases first construed the Eighth Amendment to require that a capital sentencing jury not be precluded from consideration, as a mitigating factor, of the character and record of the individual offender, as well as the circumstances of the particular offense. *Eddings v. Oklahoma,* 455 U.S. 104, 111-12 (1982); *Lockett v. Ohio,* 438 U.S. 586, 604 (1978) (plurality opinion); *Woodson v. North Carolina,* 428 U.S. 280, 303-04 (1976).

As the Court later explained, "evidence about the defendant's background and character is relevant because of the belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background, or to emotional and mental problems, may be less culpable than defendants who have no such excuse." *Penry v. Lynaugh,* 492 U.S. 302, 319 (1989) (quoting *California v. Brown,* 479 U.S. 538, 545 (1987) (O'Connor, J., concurring)). Additionally, there is no question that "testimony regarding [a] petitioner's character and his probable future conduct if sentenced to life in prison" is mitigating "in the sense that [it] might serve 'as a basis for a sentence less than death.'" *Skipper,* 476 U.S. at 4-5 (quoting *Lockett,* 438 U.S. at 604). This is because "a defendant's disposition to make a well-behaved and peaceful adjustment to life in prison *is itself an aspect of his character* that is by its nature relevant to the sentencing determination." *Id.* at 7 (emphasis added).

However, it is not constitutionally required that

consideration of mitigating evidence be structured or balanced in any particular way. *Franklin*, 487 U.S. at 179; *Booth v. Maryland*, 482 U.S. 496, 502 (1987), *overruled on other grounds*, *Payne v. Tennessee*, 501 U.S. 808 (1991); *Zant v. Stephens*, 462 U.S. 862, 875-76 (1983). Indeed, the Court has acknowledged that a *mere possibility* that the jury was precluded from considering relevant mitigating evidence by a particular jury instruction or sentencing mechanism does *not* establish Eighth Amendment error. *Boyde*, 494 U.S. at 380. Rather, such error occurs only if there is a "reasonable likelihood" that the jury applied its instructions in a way that prevented the consideration of such evidence. *Id.* This harm requirement reflects the "strong policy against retrials years after the first trial where the claimed error amounts to no more than speculation," as well as a state's interest in providing the jury with a framework for discharging its awesome capital sentencing responsibilities. *Id.*; *Franklin*, 487 U.S. at 179.

I. When Applying *Boyde*, Distinctions Between Forward-looking and Backward-looking Evidence Do Not Affect the Eighth Amendment Analysis.

The Ninth Circuit erred when it held that there was a reasonable probability Belmontes's jury was unable to consider evidence that "he would live a constructive life in prison and make positive contributions to others if granted life without the possibility of parole." *Belmontes*, 414 F.3d at 1129. The lower court reached this conclusion despite the fact that Belmontes's jury was provided with a catchall mitigation instruction which permitted it to consider "[a]ny other circumstance which extenuates the gravity of the crime." *Id.* at 1130. The court of appeals relied upon a specious distinction to reach its holding, *i.e.*, that forward-looking evidence "wholly unrelated to [Belmontes]'s culpability" was somehow different than "backward-looking" evidence in the way it related to California's catchall instruction. *Id.* at 1134. As a result, the court below found that *Boyde* — which dealt with the exact same instruction at issue in the instant case — was inapplicable. *Id.* The lower court was wrong.

While this Court's jurisprudence has recognized a distinction between forward- and backward-looking evidence, it is a distinction without a difference for Eighth Amendment purposes. *See Tuilaepa*, 512 U.S. at 977 ("Both a backward-looking and a forward-looking inquiry are a permissible part of the sentencing process"). As the Court explained in *Skipper*, testimony concerning a defendant's future prospects in prison merely reflects an aspect of that defendant's character. 476 U.S. at 7. And contrary to the Ninth Circuit's opinion below, good character is certainly viewed by society as mitigating. *Penry v. Lynaugh*, 492 U.S. at 319; *cf. Belmontes*, 414 F.3d at 1134.

This is true regardless of whether the evidence demonstrates that the defendant possessed positive character traits in the past or the potential for such traits in the future. In either case, good character extenuates the gravity of the crime to some degree. While there may be no societal consensus concerning *how* mitigating good character may be, this is a sentencing decision best left to juries, which may consider the individual circumstances of the offender and the offense. By deciding there was a reasonable likelihood the jury did not weigh Belmontes's mitigating evidence, the court below violated the province of the jury.

Indeed, this Court implicitly rejected a distinction between forward- and backward-looking mitigating evidence in *Franklin v. Lynaugh*. In *Franklin*, the plurality held that Texas's future dangerousness special issue was sufficient to encompass evidence of Franklin's good disciplinary record during a prior incarceration. 487 U.S. at 177-83. The jury instruction at issue queried the jury concerning future conduct.[2] Yet the Court deemed it adequate to

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2 The future dangerousness inquiry asks, "Do you find from the evidence beyond a reasonable doubt that there is a probability that the Defendant ... would commit criminal acts of violence that would constitute a continuing threat to society?" *Franklin*, 487 U.S. at 168 n.3 (citing TEX. CODE CRIM. PROC. Art. 37.071(b)).

give effect to evidence of past conduct. *Id.* at 178-79. This is because future conduct and past conduct both reflect on a defendant's character and, in essence, his or her deathworthiness. *Id.*; *cf. id.* at 185 (recognizing that evidence of past conduct had no constitutionally mitigating relevance to show positive character beyond the future "ability to exist in prison without endangering jailers or fellow inmates") (O'Connor, J., concurring). Thus, although *Franklin* was a plurality opinion, a majority of the Court agreed the Eighth Amendment requires only that a jury be able to give effect to a defendant's mitigating character evidence, not that it must consider forward- and backward-looking aspects of that character independently.

The Court again refused to acknowledge such a concept in *Johnson v. Texas*. There the Court held that the same Texas special issue was constitutionally adequate to encompass mitigating evidence of youth. 509 U.S. at 353. The Court first explained that Johnson's suggestion that his crime was attributable to his youth — a distinctly backward-looking viewpoint — was within the jury's effective reach in answering the forward-looking future dangerousness inquiry. *Id.* at 368-69. This is because "the impetuousness and recklessness" of youth subsides with age. *Id.* at 368. Essentially, past character begets future character; the two categories of evidence are actually one in the same.

Moreover, given the fact that the *Johnson* Court had the benefit of its earlier opinion in *Boyde*, the distinction between forward- and backward-looking evidence is even less meaningful. Application of the reasonable likelihood standard of *Boyde* with a "commonsense understanding of the instructions" does not allow for any other interpretation. 494 U.S. at 380-81; *see also Graham v. Collins*, 506 U.S. 461, 476 (1993) (the possibility that mitigating evidence might have "*some* arguable relevance beyond the special issues" was immaterial as long as the jury was able to give effect to the evidence in some meaningful way). The Ninth Circuit's decision to the contrary defies commonsense precisely because there is no reasonable, constitutional basis for it. Such a

result does not satisfy *Boyde*.

Various state courts have also rejected a distinction between forward- and backward-looking evidence in capital sentencing trials. *See, e.g., State v. Nelson,* 501 S.E.2d 716, 719 (S.C. 1998) (character includes backward-looking disposition to engage or not engage in certain behavior and forward-looking propensity to do so); *Simmons v. State,* 419 So.2d 316, 320 (Fla. 1982) (potential for rehabilitation is an element of a defendant's character relevant to mitigation under *Lockett*); *Reddix v. State,* 381 So.2d 999, 1010 (Miss. 1980) (consideration of defendant's favorable behavior both before and after the offense is relevant to deathworthiness). This is true even where — as in *Johnson* and *Franklin* — the actual sentencing inquiry is temporally limited. *See St. Clair v. Commonwealth,* 140 S.W.3d 510, 568 (Ky. 2004) (backward-looking inquiry into criminal history also allows for consideration of forward-looking evidence); *Roberts v. State,* 910 P.2d 1071, 1083 n.7 (Ok. Crim. App. 1996) ("Future threat can only be supported when past acts, coupled with the actions of the defendant in the current offense, together with any post-offense actions, provide a jury the factual basis needed to determine if a defendant will be a continuing threat to society").

Therefore, it is clear that assigning constitutional significance to whether punishment evidence is forward- or backward-looking is irrational. There is simply no reasonable likelihood Belmontes's jury believed it could not give effect to his evidence of possible future conduct within the catchall instruction at issue. As this Court explained in *Boyde,* jurors are not assumed to make severe, technical, and irrational distinctions that defy commonsense. 494 U.S. at 380-81. The lower court's decision, on the other hand, is the epitome of such illogic and must be reversed.

II. Nevertheless, the Catchall Mitigation Instruction Employed Cured Any Eighth Amendment Error.

Central to the Court's holding in *Boyde* was also the fact

that a catchall mitigation instruction — which directed the jury to consider "[a]ny other circumstance which extenuates the gravity of the crime" — did not prevent the jury from considering evidence of Boyde's good character. 494 U.S. at 381. And as demonstrated *supra*, the possibility Belmontes would be a model prisoner in the future surely reflected upon his character and may have extenuated or excused his deathworthiness in the eyes of the jurors. *Skipper*, 476 U.S. at 7. Thus, the catchall mitigation instruction submitted in this case —which is identical to the one given in *Boyde* — satisfied the Eighth Amendment requirements of *Eddings*.

This Court has repeatedly approved of such "clearly drafted catchall instruction[s] on mitigating evidence." *Penry v. Johnson*, 532 U.S. at 803. In *Penry v. Johnson*, the Court suggested that the Texas catchall instruction — "[w]hether, taking into consideration all of the evidence, including the circumstances of the offense, the defendant's character and background, and the personal moral culpability of the defendant, there is a sufficient mitigating circumstance or circumstances to warrant that a sentence of life imprisonment rather than a death sentence be imposed" — would satisfy the Eighth Amendment. *Id.* (citing TEX. CODE CRIM. PROC. Art. 37.071(2)(e)(1)).

Further, in *Blystone v. Pennsylvania*, the Court held that a catchall instruction providing for the consideration of "[a]ny other evidence of mitigation concerning the character and record of the defendant and the circumstances of his offense" satisfies the Eighth Amendment requirement that a "jury be allowed to consider and give effect to *all* relevant mitigating evidence." 494 U.S. at 305 (citing 42 PA. CONS. STAT. § 9711(e)(8)). The California catchall instruction is not meaningfully different and, arguably, is broader than either of these instructions because it does not restrict itself to the circumstances of the offense, character, or background. "Any other circumstance" means *any* other circumstance. There is no reasonable likelihood a jury would interpret such an instruction to exclude any type of evidence

from its consideration.

CONCLUSION

For the foregoing reasons, this Court should reverse the judgment of the lower court.

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